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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 673

CALIFORNIA SHIPBUILDING CORPORATION (a corporation),

Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and BELLE REBECCA GADDIS,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Comes now the respondent Industrial Accident Commission of the State of California and respectfully submits its brief in opposition to the petition for writ of certiorari filed by petitioner California Shipbuilding Corporation.

Petitioner seeks to review a decision of an intermediate state court of the State of California, which decision affirmed an award of compensation by the Industrial Accident Commission of the State of California to respondent Belle Rebecca Gaddis.

JURISDICTION.

The question presented by this proceeding is undoubtedly within the jurisdiction of the United States Supreme Court. However, as respondent will demonstrate hereinafter, the decision of the state court affirming an award of the State Industrial Accident Commission was in accord with the applicable decisions of the United States Supreme Court and no reason exists for the granting of the writ of certiorari prayed for by petitioner.

THE FACTS.

Jonas Dulpha Gaddis, an employee of the petitioner California Shipbuilding Corporation, was killed in an industrial accident and his widow, Belle Rebecca Gaddis, respondent herein, was awarded normal compensation benefits for his death, which award has never been attacked. (R. 70-71.)

The California Workmen's Compensation Act provides for the increase of such an award by 50%, but not exceeding $2500, where the injury or death of the

employee was caused by the serious and wilful misconduct of the employer.

California Labor Code, Section 4553.

The widow, Belle Rebecca Gaddis, a respondent herein, filed an application for such increased benefits. (R. 71-72.)

After notice, hearings upon this application were held before a referee of the Industrial Accident Commission. (R. 72-148.)

After each hearing was held the referee who presided formulated a report on the evidence adduced at the hearings which report was dictated by the referee to a stenographer, typewritten by her, and considered by the Commissioners of the Industrial Accident Commission before the ultimate decision of the Commission was made in the case. The final reports contain, in addition to the evidence, the recommendation of the referee, as to the determination of the point which was at issue.

Because the basis of the petitioner's complaint against the Commission's decision is petitioner's charge that the Commissioners did not know what the evidence in the case was, we believe it would be helpful to the court to quote here the evidentiary statements contained in these reports, documenting them with references to the actual testimony of the witnesses in this case as it appears in the record.

We ask the court's indulgence for this, since the reports are contained in full in the record. (Pages 156

to 168.) Our reason for restating them is to indicate to the court that, contrary to petitioner's assertions, they do contain an accurate summary of the evidence, which was considered by the deciding body, the Industrial Accident Commission.

We should also remark that as they are set forth in the record, the order of the reports is the reverse of the order in which they were issued. For the greater convenience of the court, we shall set them out in the order in which they were issued, omitting entirely however the earliest (R. 167-168) which related only to the normal award for benefits, irrespective of serious and wilful misconduct, which has not been attacked, and the last report which which merely corrected a clerical error. (R. 156-157.)

Omitting certain information which is contained at the heading of each report for statistical purposes, they are as follows:

"MEMORANDUM ON HEARING ON AMENDED APPLICATION ON SERIOUS AND WILFUL MISCONDUCT.

"(Nothing paid applicant's attorney.)

"*Alex Morkal* testified he was a boilermaker's helper. (R. 73.) That he and the deceased were working on the same scaffolding. (R. 74.) That this was staging on which they were standing bolting up on the outside of the hull. (R. 74.) That they went on the swing shift about 4:30 P.M. (R. 80.) That the scaffolding was about 40 feet up in the air. (R. 60A.) That it was composed of two planks with a safety guard rail, the

planks being about 12 inches in width and but two of them. (R. 77.) That farther down to the right a distance of 48 feet was a stairway which took workmen to the ground. (R. 60A.) That between the landing from the stairway at the forty foot level and the location where the witness and the deceased were bolting up, was a distance of about 16 feet where the planks failed to meet, leaving a straight drop of 10 feet to the next staging or 40 feet to the ground (R. 60A), which was the fall the deceased suffered which ended fatally. Testified it happened at 7 o'clock. (R. 75.) That there were lights there but due to the dimout they couldn't be very bright.* That the deceased told him about 7 P.M. that he was going to get a drink and the witness saw him walk down the plankway toward the stairs which was a distance of about 48 feet, the last 16 or 20 of which was the area of the walkway left open by the failure to carry the planks on across. (R. 75.)

"Testified that he complained to the riggers and other men about this as well as to the foreman, but that nothing had ever been done. (R. 82, 84, 85.)

"*Frank Zaby* testified that he was not on the same ship as the deceased but that he was coming down to get a drink and saw a body falling, it being about 12 feet from the ground at that time. (R. 88.) That he didn't see the staging either then or subsequent. (R. 89.) That he called the first aid station and did what he could to make the deceased comfortable. (R. 89.)

*Morkal's testimony does not support this statement. (R. 86, 87.) However, see the testimony of Zaby. (R. 90.)

"*C. W. Towt,** permanently assigned at CalShip for the past 11 months, was on the day shift, hence not on duty at the time the deceased fell. (R. 91.) Testified that on the morning following the accident he had inspected the rig. (R. 94.) Had found it repaired with all new lumber. (R. 95.) Had on many occasions complained to one Robinson, the rig foreman, about missing planks in scaffolding (R. 94) as had he also done with Peterson who was the assistant director of the CalShip Safety Counsel. (R. 96.) Testified he had spoken to him daily—constantly—about the staging, its bad condition. (R. 98, 99.) Testified also that he had gone around with one John Jago who was in charge of the lumber department for the scaffolding as well as the scaffolding and Jago had made the observation that the lumber conditions and the scaffolding were very bad and that something should be done about it. (R. 97.)

"*Alex Morkal,* recalled (R. 105), testified that the scaffolding had been in that condition since he went to work that night. (R. 107.) That he had walked up the stairs and then had climbed over the hull and around to where he and deceased were bolting up to get on that section of the scaffold. (R. 107.)

Disposition:

"Continued to April 13, 1943, 9:30 a.m. Notice waived.

CLAUD M. DUNN, Referee.

"CMD:er. 3-12-43"

---

*Safety Engineer, State Industrial Accident Commission.

"MEMORANDUM ON FURTHER HEARING AND DECISION.

"George Robinson (for app.) testified he had been employed by the defendant employer since 1941, starting out as a rigger, and then in August, 1942, being made staging rigger foreman. (R. 108, 109.) Testified he was on the day shift; that he had been working on the particular scaffolding herein involved. (R. 109.) Testified that [see Def't Ex. 2 (R. 60A)] in the upright section 'Z', just to the left of the stairway, he had noticed there was only one plank extending the 16' or so feet over to the supporting scaffold, about midway between 'Z' and 'Y'; that in order to prevent employees from turning to the left on that level he had nailed a barrier there [see vertical red mark (R. 60A)]. (R. 112.)

"Testified that running the full length to the left, and toward the stern of the hull, and extending down to the ground, was a scaffold; that this scaffolding was divided into approximate vertical six-foot apart* walkways; that this walkway was 42 or 44 in. wide (R. 111); that workmen in using it would face the hull, but that there was a guard rail behind them. (R. 113.)

"Testified that the particular section of the hull on which the work was being done was on the top level (R. 109, 110); that at the furthermost left-hand end of this scaffold there was no cross bar at all (R. 114); that between 'X' and 'Y' there were two planks 12 in. each in width (R. 111, 60A); that in the area covered

*The testimony of Hart indicates that the walkways were about 6 vertical feet apart. (R. 125.)

by section 'Z' there was only one 12 in. plank. (R. 111, 60A.) Testified that he knew that additional planks were called for by the safety orders, and had ordered one from an expediter, one Westerlund by name. (R. 113, 120.)

"Testified that he had had a number of conversations with the Industrial Accident Commission safety engineer permanently assigned to Calship, C. W. Towt, about the staging conditions; that Towt had spoken to him 'constantly' about the unsafe condition, and that he had done nothing about it. (R. 120, 121, 122.) Also testified that the catwalk extending around the top of the hull was above level No. 6 on which the men were working. (R. 117, 118.)

"Joseph M. Hart (for deft.) testified he is stage rigger foreman (R. 123); for 6 months on the swing shift (R. 123) (which was 4:30 P.M. to 12:30) (R. 123); testified he heard the accident happen just before seven o'clock (R. 123); that it was not dark at that time (R. 123); that the men were working on the top level (R. 124), there being six in all (R. 124), not including the catwalk; that upon hearing there had been an accident he went to the scene and found the body of the deceased in a junk scrap-iron box approximately 10 x 16 ft. (R. 125) in the bin which was on the ground, in part of the area covered by section 'Z' (R. 124); that he did what he could to make him comfortable;* that he thereafter went up and looked over the level where the men had been working (R. 125);

*It was Morkal who so testified. (R. 89.)

that in the section 'X' there were three boards, but that there were no planks, not even one, in the area covered by 'Z'. (R. 127.)

"Testified that the foreman had told him there were three boards required for a walkway (R. 129), and that there were three at the point where the men were working (R. 129); that the distance between where the men were working and the stairs was about 60 ft. (R. 129.)

"Under cross-examination testified he did not know for certain whether in the area covered by 'X' there were two or three planks. (R. 130.)

"Testified that changes were being made in the hooking up of the scaffolding, in view of the advancing work on the boat. (R. 134.)

"Walter H. Pelukharp (for deft.) testified that he is safety engineer for Calship (R. 134); had been there 9 months (R. 134); was on the swing shift (R. 135); knew safety order 1806 (R. 135); had made frequent general yard inspections; knew where the accident occurred; made an immediate investigation of it (R. 135); inspected the construction of the staging (R. 135); that this took approximately three hours (R. 136); that immediately above the end of the planking, at the right of section 'Y', was a thousand watt flood lamp pointed down (R. 136) about three inches above the level of the catwalk, which would have made it about 8 ft. above the level of the walkway (R. 140); that at the immediate foot of the stairway was a drinking fountain. (R. 137.)

"Testified that when he made his examination there were two planks serving as a walkway between 'X' and 'Y', but that in the area covered by the letter 'Z' there were no planks whatever. (R. 138.) Testified that he talked with applicant's co-worker, one Pritchard, approximately 30 minutes later (R. 138); that Pritchard was working with deceased when deceased went to get a drink of water. (R. 138.)

"On cross-examination testified that, although he had been employed as a safety engineer by Calship for approximately nine months, he had prior to that time, for the seven years immediately preceding, been building and construction contractor in Los Angeles (R. 139, 140); that at time of his investigation there was no stop cross bar on level No. 6, where the men were working, to prevent a man from walking off into space (R. 142); that there were no planks extending over that. (R. 142.)

"Nels E. Peterson (for deft.) testified that he was chief safety inspector for Calship since 4-20-42 (R. 144); prior thereto had been employed by Federal Government in same line of work. (R. 144.) Testified he worked under Miller, who was head safety engineer for Calship (R. 144); that he—witness—had fifteen men working under him (R. 145); that I.A.C. inspector Towt would make reports to him as to conditions. (R. 146.) Testified he could not remember that Towt had ever spoken to him personally with regard to the condition of the staging. (R. 146.)

"It was stipulated that if Belle Rebecca Gaddis were called and sworn, she would testify that the watch of the deceased was found stopped at 7:34 p.m. (R. 148.)

"Anent the statement of E. M. Pritchard, co-worker with deceased, both counsel for applicant, as well as counsel for employer, testified they had done everything they could to locate the man, and were unable to do so. It was admitted, therefore, without objection, Pleukharp having testified that the statement was procured from Pritchard by him approximately 30 minutes after the fatal fall. (R. 138, 139.)

"It will be noted in that statement that Morkal, who had previously testified as a witness, stated that after deceased left him with the statement he was going to get a drink it was not more than two or three minutes before information was relayed to the effect that the deceased had fallen.

Disposition:

Submitted.

Discussion:

"Although counsel for applicant had the report of C. W. Towt, I, of course, did not make an order admitting it, or a copy thereof, which is in the correspondence section of the file. The concluding paragraph of that report reads as follows:

> "This accident might have been avoided if warning lights had been placed at the point where the planks were missing and a good barricade had been placed across the defective staging. Pri-

marily the staging should have been completed to standard width of 36 in., as it is apparent that new planks were available in the yard. The company had been repeatedly warned of the prevalence of defective staging, and ordered to correct same.'

"This statement, particularly the warning part thereof, corroborates the testimony of C. W. Towt. In view of the fact that George Robinson testified he had 'constant' conversations with Towt about the unsafe condition of the staging, and in view of the fact that he was a stage rigger foreman, I feel that if this case were held to be otherwise than serious and wilful misconduct that section might just as well be stricken from the act; there would be no reason for its continued existence.

"I am satisfied that the matter is serious and wilful.

Disposition:

"Findings and Award submitted herewith, finding serious and wilful misconduct in the amount of $2500.00, payable at the rate of $12.50 a week; $250.00 attorney's fee.

CLAUD M. DUNN, Referee.

CMD/gr

"N. B. In allowing this attorney fee of $250.00, I would like to say that there was considerable investigation done by this attorney. The case was well put on, in my opinion, and I feel that a fee of anything less than $250.00 would be out of line. The value of the services, in my humble opinion, was in excess of the amount I am allowing.

CMD."

"MEMORANDUM ON ORDER DENYING EMPLOYER'S PETITION FOR REHEARING.

"Dunn, Referee.

"Flange helper, 51, fell, about 40 ft. from a scaffold December 29, 1942 and died as result of the fall on January 2, 1943.

"The widow was awarded maximum death benefit on February 5, 1943 which is not questioned. Subsequently applicant filed claim for serious and wilful misconduct of the employer. Findings and Award issued June 24, 1943 finding injury was proximately caused by the serious and wilful misconduct of the employer and award issued for an additional $2500.00.

"Employer, California Shipbuilding Corporation, now petitions for rehearing from the Findings and Award covering serious and wilful misconduct on the grounds that the evidence does not support such a finding; and, particularly that the allegations were allowed to be proved by hearsay evidence and, also, that there was no proof or knowledge of the safety orders alleged to have been violated.

"That there was no proof that violation of the Safety Orders proximately caused the injury.

"Transcript has been written at employer's request and time allowed thereafter to file points and authorities, which are now in.

"The Finding of Serious and Wilful is based on violation of Ship and Boat Building Safety Orders 6402 (which is also Labor Section 6402) and Order No.

1806, both of which were specifically pleaded. They are as follows:

> 'Section 6402. No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe.'
>
> 'Order 1806. Width of Slip Staging. (a) Slip staging shall be not less than thirty-six (36) inches wide. Planks not less than twenty-four (24) feet long shall be used whenever possible.'

"As the first Section is also a general law no proof or knowledge is required. There is an abundance of evidence particularly in the testimony of the Safety Engineer of the Industrial Accident Commission, Mr. C. W. Towt, that there was more or less continuous violation of the staging requirements by the employer (R. 96, 98, 99); that this had been taken up with the Safety Department of the employer on various occasions, without getting any results. (R. 98, 99.) That this condition had caused several deaths prior to this accident. (R. 98.)

"It would appear without serious question that the scaffold in question where the deceased fell was unsafe, having gaps in the planking (R. 76, 77, 79, 87, 95, 96, 97, 98, 99, 101, 102, 103, 105, 106, 113, 114, 142) and the planking being of insufficient width. (R. 77, 101, 102, 129.) While there is a conflict in the evidence, there appears to be substantial proof of the violations and also substantial proof of notice of existence of violations to the employer or its managing representatives.

"The accident occurred after dark.* There was no immediate eyewitness to the fall but from the evidence it appears reasonable to believe that, due to the poor lighting which was shown to have existed (R. 90), applicant fell thru one of the gaps (R. references, supra) in the planking of the scaffold over which he had to pass. From this it appears the violation was the proximate cause of the death which, in my opinion, completes the case of serious and wilful misconduct. As the decision appears to be substantially supported by the evidence, I believe the Award should stand as issued.

Disposition:

"Order denying employer's petition for rehearing.

CLELL H. MCCREDIE, Referee.

CHM:REH."

SUMMARY OF ARGUMENT.

1. The practices of the Industrial Accident Commission conform with the California constitutional and statutory provisions relating to the hearing and determination of workmen's compensation controversies.

2. The California constitutional and statutory provisions on the subject provide a method of trial and determination which affords litigants "due process of law".

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*The record shows that the accident occurred at about 7 o'clock on December 29. (R. 75, 74.)

3. The trial and determination of the particular case involved herein were conducted, both in form and in substance, strictly in accordance with constitutional and statutory requirements.

ARGUMENT.

1. THE PRACTICES OF THE INDUSTRIAL ACCIDENT COMMISSION CONFORM WITH THE CALIFORNIA CONSTITUTIONAL AND STATUTORY PROVISIONS ON THE SUBJECT.

The California workmen's compensation law was passed by the Legislature pursuant to the authority contained in Article XX, Section 21 of the California Constitution. In the opening paragraph of that constitutional section, the people of the State detailed many of the features that they desired the Legislature to place in such legislation.

More important to the case before us is the second paragraph of that section, by which the people vested the Legislature "with plenary powers, to provide for the settlement of any disputes arising out of such legislation by arbitration, or by an Industrial Accident Commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and [the Legislature] *may fix and control the method and manner of trial of any such dispute* * * *" (Emphasis added.)

The agency chosen by the Legislature to hear and determine such controversies originally, is the Industrial Accident Commission.

California Labor Code, Sections 5300, 3205.

In fixing the method and manner of trial of such disputes, as the Constitution empowers it to do, the Legislature enacted provisions permitting the Industrial Accident Commission to refer cases to referees "to try the issues in any proceeding before it, *whether of fact or of law,* and to report a finding, order, decision or award based thereon * * *" (Emphasis added.)

California Labor Code, Section 5309.

Also pursuant to its constitutional power "to provide for the settlement of any disputes arising under such (workmen's compensation) legislation" and to "fix and control the method and manner of trial of any such dispute", the Legislature provided:

> "A majority of the commission shall constitute a quorum for the transaction of business, the performance of duty, or the exercise of power of the commission. A vacancy on the commission shall not impair the right of the remaining members to perform the duties and exercise the power of the commission. The act of the majority of the commission, when in session as a commission, is the act of the commission, *but any investigation, inquiry, or hearing, which the commission has power to undertake or to hold, may be undertaken or held by or before any commissioner or any referee appointed by the commission for that purpose, and every finding, order, decision, or award made by any commissioner or referee, pursuant to such investigation, inquiry or hearing, when approved and confirmed by the commission and ordered filed in its office, is the finding, order, decision or award of the commission."* (Emphasis added.)

California Labor Code, Section 115.

It has for many years been the universal practice for referees hearing a case to prepare a memorandum or report of the evidence adduced at each hearing, and when the evidence is complete to make a recommendation to the Commission as to how the referee believes the case should be decided. That was done in this case, as has been pointed out. The reports appear in the printed record (R. 156-168) and, with the exception of two which have no bearing on the issues here, have been reproduced in this brief (pp. 4 to 15) so that it could be shown by references to the testimony that the reports truly reflected the evidence actually adduced in the case.

We respectfully submit that from the above it is clear that the practices of the Industrial Accident Commission, which were followed in this case, conform completely with the California constitutional and statutory provisions on the subject.

---

2. THE CALIFORNIA CONSTITUTIONAL AND STATUTORY PROVISIONS ON THE SUBJECT PROVIDE A METHOD OF TRIAL AND DETERMINATION WHICH AFFORDS LITIGANTS "DUE PROCESS OF LAW".

It is clear from a reading of the Petition for Writ of Certiorari and Brief in Support Thereof, that petitioner's contention that it was deprived of its property without due process of law rests on its assertion that the award of the Industrial Accident Commission and the affirmance of the award by the State District Court of Appeal are contrary to the decisions of the

United States Supreme Court in the two appeals in the *Morgan* cases. (Petition, pp. 15, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, and 32.)

It is the position of the respondent Industrial Accident Commission, on the other hand, that the action of the Commission in the hearing of workmen's compensation cases is prescribed by constitutional and statutory provisions, that such provisions are designed to give due process of law to the litigants in such cases and that the particular case was heard and determined, both in form and in substance, strictly in accordance with constitutional and statutory requirements, and consequently that neither the award of the Commission nor the decision of the District Court of Appeal affirming the award are in conflict with the rulings of the Supreme Court in the *Morgan* cases.

The Industrial Accident Commission, of course, agrees with petitioner that the person or body deciding a judicial controversy must know the evidence, and that before such person or body may know the evidence there must be afforded to the litigants a full and fair opportunity to be heard on their presentation of such evidence.

The *Morgan* cases themselves, however, are authority for the proposition that the person or body making the final decision in the controversy need not hear personally all of the evidence. "Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates". "Assistants may prosecute inquiries."

Morgan v. United States, 298 U. S. 468, 481.

That is precisely what the California law permits the referee to do. That is what he did in this case. He took the evidence and formulated it in a written report which was given to the Commission which made the ultimate decision in the case. This latter step in the procedure, though held by the *Morgan* cases to be not essential to the validity of the hearing was approved by the Supreme Court as a good practice found to be of great value in proceedings before the Interstate Commerce Commission.

Morgan v. United States, 298 U. S. 468, 478.

The proposition that the deciding body need not personally hear all the evidence is also approved in *National Labor Relations Board v. Baldwin Locomotive Works,* 128 Fed. (2d) 39, 65, cited by petitioner. In citing this case petitioner called the attention of this court to the report of the Attorney General's Commitee on Administrative Procedure on page 63 of 128 Fed. (2d) 39. Although this report is quoted in the "concurring and dissenting" opinion, the judge in quoting it was actually dissenting from the action of the majority on the point with which we are here concerned. And even in that dissent he approved, on page 65, the practice of making an "intermediate report" on the mass of evidentiary material which is adduced in particular cases.

In support of its proposition that the deciding body must be familiar with the evidence, petitioner cites *State ex rel. Madison Airport Co. v. Wrabetz,* 285 N.W. 504.

As to that case we admit that petitioner has quite accurately interpreted the ruling of the Wisconsin court to be "that there is not due process of law where members of the Industrial Accident Commission assume to review an examiner's findings without reading a transcript of the evidence, *or without otherwise addressing themselves to the evidence*". (Petition, p. 28.) (Emphasis added.)

In the case at bar the Commission did, of course, address itself to the evidence as accurately summarized in the referees' reports or memoranda.

The case of *Kaegli v. Industrial Commission,* 285 N.W. 845, cited by petitioner as being in accord with the *Morgan* cases, merely confirmed the right of a party to offer proof of her allegation to the court that "no review whatever" of the evidence taken before the examiner was made by the Commission on plaintiff's petition for a review of the findings and order made by the examiner.

Admitting for the purpose of argument that petitioner may press its technical complaints as to the legal sufficiency of proceedings before the Industrial Accident Commission, it is plain that it cannot charge, as did the plaintiff in the *Kaegli* case, that the Commission made no review of the evidence taken before the referee.

In *Joyce v. Bruckman,* 15 N.Y.S. (2d) 679, four of the five members of the board who revoked a license "concededly knew nothing of the facts, on which the determination was based, excepting what they were told by the fifth member". This was held

to be improper, but such is not the situation here where all the members of the Commission were familiar wilth the evidence as summarized by the referee. Also, though holding that the action of the license board in this case was improper, this decision calls attention to that portion of the first *Morgan* decision which observed, among other things, that "Evidence * * * may be sifted and analyzed by competent subordinates".

In the case of *National Labor Relations Board v. Cherry Cotton Mills,* 98 Fed. (2d) 444, the court merely declined to enforce the board's order until an inquiry could be made as to whether or not the board had considered the case before it and based its order upon all the testimony and evidence. The court also remarked in passing: "We do not understand that it is indispensable that the Board members shall have heard the evidence delivered or shall have read it all".

The *Morgan* case is cited in *Donnelly v. National Labor Relations Board* (cited by petitioner), 123 Fed. (2d) 215, 220, as authority for the points that the Circuit Court of Appeals has the right to ascertain whether a federal administrative board has accorded a full and fair hearing to any party aggrieved by the order of the board and that all questions concerning the regularity of the proceedings before such an agency are subject to review by the federal courts. With both of these propositions we agree. However, the constitutional prohibitions against taking property without due process of law do not guarantee any

particular form of procedure; they protect substantial rights.

National Labor Relations Board v. Mackay Radio Co., 304 U.S. 333, 351.

The last case cited by petitioner to support its point that the deciding body must know the evidence is *Crow v. Industrial Commission,* 140 Pac. (2d) 321. This case held that when the person (member, examiner or referee) who held the hearings is not with the Commission when the decision is made, the record must show that the one who made the determination on the facts "had access to the benefit of his findings, conclusions and *impressions* of such testimony, by either written or *oral* reports thereof". (Emphasis added.) (In the case at bar the referee who heard the case was with the Commission when the Commission made its ultimate decision, and the Commission had before it his written report accurately summarizing the testimony.)

The court continued immediately after the matter quoted above: "This does not necessarily require that all of the Commissioners must be present at the hearing, or even that the one hearing the evidence must concur in the result * * *".

It is respectfully submitted that rather than showing that the method of hearing and determining cases before the Industrial Accident Commission of California is contrary to the provisions of the Constitution prohibiting the taking of property without due process of law, the authorities cited by petitioner, including the two decisions in the *Morgan* case

indicate that the method provided by California law for the trial and determination of workmen's compensation cases does afford a full and fair hearing to the parties.

As pointed out on page 32 of the petition, the California courts of last resort have held that the method provided by California law for the trial and determination of industrial accident cases does provide due process of law when that method is properly applied.

Taylor v. Industrial Accident Commission, 38 Cal. App. (2d) 75.

Petitioner finds fault with the *Taylor* case on the ground that under the rule which it lays down both the Commission and the referee may be "wrong"; that is, the Commission may without hearing or reading a complete transcript of the evidence approve the decision of a referee even when it is "wrong". Petitioner thus overlooks the principle that the power to decide necessarily carries with it the power to decide wrongly as well as rightly.

21 *C.J.S.* (*Courts* § 27), pp. 38, 39.

Under the California constitutional section the Legislature could have provided a method of trial and determination which did not contain any provision for rehearing by the Industrial Accident Commission, without violating the due process clauses of the Constitution. All that is required is a full and fair hearing and this is afforded by the method provided for by California law.

In addition to the *Taylor* case cited by petitioner, we respectfully call this court's attention to the reasoning of the California courts in *Darling v. Industrial Accident Commission* (Dec. 14, 1944), 67 Advance Calif. Appellate 339, as well as the reasoning of the State District Court of Appeal in the present case.

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3. THE TRIAL AND DETERMINATION OF THE PARTICULAR CASE INVOLVED HEREIN WERE CONDUCTED, BOTH IN FORM AND IN SUBSTANCE, STRICTLY IN ACCORDANCE WITH CONSTITUTIONAL AND STATUTORY REQUIREMENTS.

The reports on memoranda of the referee and reviewing referee on the evidence in the case have been set forth herein on pages 4 to 15, supra.

An analysis of these reports, clause by clause, shows that every statement in them is based on the record. Petitioner does not call attention to any evidence in the record which was omitted from the reports.

Petitioner does quote (Petition, p. 8) from the opinion of the State District Court of Appeal which is under attack, a statement that "the report did not include a summary of the evidence". It should be emphasized that the report to which the court was then referring was that of the *reviewing* referee as distinguished from the trial referee. The referee who heard the witnesses in the case made a very complete and very accurate summary of their testimony. See pages 4 to 12, supra.

Also, as the court remarked, while the report of the reviewing referee did not contain a summary of the

evidence, since that had been done by the man who heard the evidence, "*it did state generally the facts as to the condition of the staging and the circumstances of the accident, which were established by the evidence* * * *". (Emphasis added.)

Further on, the petition states that the reports were inadequate to show the proximate cause of the death. A mere glance at the reports indicates that the proximate cause of the death was that the employee walked off the end of a scaffold which was required to be guarded but which was not, though the defects had been called to the attention of the employer's representatives many times. The testimony indicated this to the referee. His report, accurately summarizing the testimony, indicated it to the Commission. The Commission decided the case in accordance with the evidence.

It it therefore respectfully submitted that the hearing and determination of the case were in strict accord with constitutional requirements.

For the foregoing reasons it is respectfully urged that the petition for writ of certiorari be denied.

Dated, San Francisco, California,
January 22, 1945.

EVERETT A. CORTEN,
Attorney for Respondent,
Industrial Accident Commission of the State of California.

Due service and receipt of a copy of the within is hereby admitted

this.....day of January, 1945.

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Attorneys for Petitioner.